84-751

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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November 5, 1984

QUESTIONS PRESENTED

1. May a wrongfully discharged employee obtain judicial review of his breach of contract claim if his employer denies the employment and his union accepts this denial and does not include the employer in the grievance process?

2. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes (1967) 387 U.S. 171 in its determination of the issues of the union's duty of fair representation and the employer's repudiation of the grievance process?

3. Should this Court's decision in Vaca v. Sipes, supra, requiring a wrongfully discharged employee to prove a breach of the union's duty of fair representation before he can sue his employer, be reconsidered where there is evidence of deception on the part of the employer?

PARTIES TO THE PROCEEDING

1. Lonnie Lewis, Petitioner
2. Joseph Magnin Co., Inc., Respondent
3. New Magnin, Inc., Respondent
4. Eckdahl Warehouse Co., Respondent
5. Brotherhood of Teamsters and Auto Truck Drivers, Local 85, Respondent

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. ____

LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Lonnie Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 28, 1984.

OPINION BELOW

The opinion of the Court of Appeals,

not reported, appears in the Appendix hereto. The three separate orders of the District Court for the Northern District of California granting a directed verdict also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 28, 1984. A timely petition for rehearing was denied on August 7, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 185. Suits By And Against Labor Organizations.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an

> industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Lonnie Lewis is a Teamsters Union truck driver from Pleasanton, California. Petitioner was employed by respondent Joseph Magnin Co., Inc. (Magnin), in San Francisco, California for eight years. In 1979 he was terminated from his job for filing a grievance over a disputed reduction in pay.

Lewis was hired by Magnin in 1971 when the company decided to establish its own in-house trucking operation to

save money, to improve security, and to gain greater control over the drivers. Magnin leased a number of highway tractors and trailers as well as smaller trucks and hired approximately six local drivers and two long distance line drivers, including petitioner. The manager of Joseph Magnin who was in charge of setting up the new trucking operation interviewed and hired Lewis and told him that, although he would work for Joseph Magnin, his paycheck would come from A & B Garment Delivery Company (A & B). The Magnin manager assured him, however, that his employment would be pursuant to the collective bargaining agreements negotiated by his union, the Teamsters National Master Freight Agreement and the Western States Area Over-The-Road Motor Freight Supplemental Agreement. The drivers received all of their instructions and supervision from Magnin who published a

manual of rules for the drivers and regularly provided additional written and oral instructions to them.

During his employment Lewis drove a truck from San Francisco to a point midway between San Francisco and Los Angeles where he met a Magnin driver coming from Los Angeles. The drivers exchanged trailers and each returned to his point of origin.

Magnin considered petitioner to be a Magnin employee and issued him an employee identification card, store and gasoline credit cards and an employee discount at Magnin stores. A & B paid petitioner's wages and benefits and billed Magnin for the total sum plus a 10 percent commission.

In 1973, A & B notified Magnin that it wished to terminate their relationship. Magnin then entered into a Driver Service Agreement with respondent Eckdahl Warehouse Company which provided that

Eckdahl would pay the Magnin drivers and be reimbursed by Magnin for all expenses plus an eight percent commission. The Driver Service Agreement also provided that Lewis' employment would be consistent with the collective bargaining agreement. Magnin continued to supervise the trucking operation and petitioner's seniority continued to be determined from the commencement of his employment with Magnin in December, 1971.

In 1975, Magnin replaced Eckdahl with Dublin Fast Freight, which signed the collective bargaining agreement with respondent Brotherhood of Teamsters and Auto Truck Drivers Local 85 (Local 85), petitioner's union. In 1977, one of Lewis' paychecks from Dublin was returned by the bank. Lewis notified Joseph Magnin which immediately terminated its relationship with Dublin and returned to Eckdahl under the 1973

Driver Service Agreement. Eckdahl then paid Lewis for the returned Dublin check. Petitioner's employment continued until the summer of 1979 when the events occurred which led to his discharge and this litigation.

Under the collective bargaining agreement petitioner was paid on the basis of both the miles he drove and the non-driving hours he worked (worktime). Between 1971 and August, 1979, petitioner was paid for a minimum of three hours of worktime per day. In July, 1979, however, a Magnin traffic manager asked Lewis to reduce his worktime pay. Lewis rejected any reduction in pay. In August, 1979, Magnin stopped paying a portion of Lewis' worktime and told petitioner that all of his instructions would henceforth come from Eckdahl. Lewis challenged the paycut and respondent Local 85 represented him in this dispute.

Under the collective bargaining agreement only the union could invoke the grievance process on behalf of a driver. The informal grievance procedure was commenced by the union in September, 1979, but only against Eckdahl, not against Magnin. Eckdahl, however, kept Magnin informed of the grievance process. Eckdahl's manager told Lewis that if he persisted with the grievance over the worktime he would be out of a job. Local 85 filed a formal grievance under the Maintenance of Standards provisions of the collective bargaining agreement on October 9, 1979. Three days later, on October 12, 1979, petitioner's employment was terminated. Magnin then changed its operations and contracted with a company in Southern California which flew one of its drivers to San Francisco to take petitioner's job. Petitioner first contacted Magnin

to object to this termination. Magnin denied petitioner was its employee, or that it had any obligation to him. Magnin told petitioner that he would have to take up the matter with Eckdahl.

Local 85 filed a second grievance to challenge the termination of petitioner's employment, but again only against Eckdahl because of a union agent's mistaken belief that a grievance could not be filed against Magnin if it was not a signatory to the collective bargaining agreement. This grievance was based on the change of operations provisions of the collective bargaining agreement which prohibited the type of change put into effect by Magnin in October, 1979.

The formal grievance process under the collective bargaining agreement involves a series of grievance committees comprised of an equal number of employer

and union representatives. Neither the local union nor the particular employer who are parties to a grievance, however, sit on the panel hearing their grievance.

The Petitioner's termination grievance was heard by the first level grievance panel, the Bay Area Labor Management Committee, in December, 1979. This Committee sent the grievance to the second level committee by a deadlock or an equally divided vote. The second level committee, the Joint Western Area Grievance Committee, meeting in San Diego, California, on February 12, 1980, heard and denied petitioner's grievance. The committee gave no reason for its decision. Magnin was not present at the San Diego grievance meeting but both Local 85 and Eckdahl denied that anyone had a contract with Magnin. Eckdahl did admit, however, that Magnin had changed its operations.

Petitioner brought the instant

action for breach of contract and breach of the duty of fair representation under 29 U.S.C. Section 185, 29 U.S.C. Section 159 and 28 U.S.C. Section 1337 in the United States District Court for the Northern District of California in April, 1981. The action proceeded to a jury trial in June, 1983, The Honorable Lloyd H. Burke, presiding. Petitioner presented evidence for six days after which each respondent moved for directed verdict. The District Court granted each motion, dismissed the complaint, and entered judgment for each respondent. See Appendix hereto for the three orders of the District Court. The Court of Appeals affirmed. The Court of Appeals held, in short, that Local 85's failure to file a grievance against Joseph Magnin may have been an "error in judgment" but was not a breach of its duty of fair representation. It also held that Magnin

did not repudiate the grievance process because Local 85 named only Eckdahl in the grievance and Magnin was never asked to participate. The opinion of the Court of Appeals is in the Appendix hereto along with its order denying rehearing.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With This Court's Decision In Vaca v. Sipes.

There is no dispute that petitioner Lewis attempted to exhaust the exclusive grievance procedure established by the collective bargaining agreement. However, Lewis was unable to grieve against Magnin because Local 85 did not file a grievance against Magnin and Magnin denied Lewis' employment. The Court of Appeals recognized the failure of the grievance process, ignored the decision of the grievance panel, and

analyzed the instant case as if the grievance process did not occur. The decision of the Court of Appeals, however, is inconsistent with this Court's decision in Vaca v. Sipes (1967) 386 U.S. 171, in both its determination of the union's duty of fair representation and in its determination of Magnin's repudiation of the grievance process.

In Vaca, this Court set forth when an individual employee may obtain judicial review of a breach of contract claim despite his failure to secure relief through the contractual remedial procedures. The first such circumstance is

> when the conduct of the employer amounts to a repudiation of those contractual procedures [citations omitted]. In such a situation . . . the employer is

> estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Vaca v. Sipes, supra, 386 U.S. at 185.

In the instant case, Magnin denied petitioner's employment as early as August, 1979, when it told petitioner that all of his instructions would, from then on, come from Eckdahl. The denial was reaffirmed by Magnin at numerous times including the time of Lewis' termination, in Magnin's answer to the complaint in this action, and throughout the trial and appeal of this case.

The Court of Appeals, however, ruled that there was no repudiation of the grievance procedures by Magnin. The lower court's decision was not based on any conduct of Magnin but solely on the

conduct of Local 85 in failing to name Magnin in the grievance or request that Magnin participate in the grievance process. The Court of Appeals failed to consider Magnin's direct denial of Lewis' employment. Magnin's action toward Lewis, not Local 85's analysis of the grievance procedure, is the evidence which determines Magnin's repudiation of Lewis' right to grieve. See Drake Bakeries v. Bakery Workers (1962) 370 U.S. 254.

The second situation recognized in Vaca when an employee may obtain judicial enforcement of his contractual rights arises

> if . . . the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if . . . the employee-plaintiff has been prevented

from exhausting his
contractual remedies
by the union's wrongful
refusal to process the
grievance.

Vaca v. Sipes, supra, 386 U.S. at 185 [emphasis in original].

In the instant case there is no dispute that the union has the sole power under the collective bargaining agreement to invoke the grievance process. The only remaining issue is whether petitioner has been prevented from exhausting his contractual remedies by the union's wrongful refusal to name Magnin in the grievance. The opinion of the Court of Appeals clearly recognizes that the union made "errors in judgment by not filing a grievance against Magnin . . . ." The lower court, however, found this, and other union errors, insufficient to constitute a breach of the duty of fair representation. Again,

this finding is directly inconsistent with the specific rule set out in Vaca.

2. The Purposes Of Federal Labor Laws Will Be Advanced By Modifying The Rule Of Vaca v. Sipes Where There Is Employer Deception

Under the judgment of the Court of Appeals, petitioner is remediless. "To leave the employee remediless in such circumstances would . . . be a great injustice." Id. at 186. Under Vaca, an employee's breach of contract claim against his employer is permitted where there is evidence of such wrongful union conduct even where "the employer . . . may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed . . . ." Id. at 185. In the instant case, however, Magnin did everything within its power to conceal its employment of petitioner and its agreement that the employment of petitioner be consistent with the collec-

tive bargaining agreement. Magnin's conduct with regard to petitioner's employment and the collective bargaining agreement after August, 1979, was a deception to avoid any contractual liability to either petitioner or Local 85. Where such deception by the employer can be shown, this Court should consider expanding the rule established in Vaca that

> the wrongfully discharged employee may bring an action against his employer . . . provided the employee can prove that the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance.

Id. at 186.

The Court of Appeals found that although Local 85 made "errors in

judgment," the errors "do not reach the 'egregious' level, reflecting 'reckless disregard' for Lewis' rights." See Ninth Circuit Memorandum Decision at App. 5. If this Court were to remove the requirement of establishing a breach of the union's duty of fair representation where there is evidence of deception on the part of the employer, the type of "great injustice" to the employee in the instant case and referred to in Vaca will have a remedy while the standard of conduct for a union's duty of fair representation will not be altered.

Protection of an employer who engages in such deception will not serve the underlying purposes of the federal labor laws and will discourage industrial peace, employee organization, and collective bargaining.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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November 5, 1984.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE LEWIS, Appellant, v. JOSEPH MAGNIN CO., INC., NEW MAGNIN, INC., ECKDAHL WAREHOUSE CO., and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL 85, Appellees.	)	F I L E D AUG -7 1984 No. 83-2206 DC No. C 81-1481-LMB MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Lloyd M. Burke, United States District Judge, Presiding

Before: WISDOM,* SKOPIL, and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

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*The Honorable John Minor Wisdom, Senior Circuit Judge, Fifth Circuit Court of Appeals, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE LEWIS, Plaintiff-Appellant, vs. JOSEPH MAGNIN CO., INC., NEW MAGNIN, INC., ECKDAHL WAREHOUSE CO., and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, LOCAL 85, Defendants-Appellees.	F I L E D JUN 28 1984 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS No. 83-2206 DC No. C 81-1481-LMB MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
Lloyd M. Burke, United States District Judge, Presiding

Argued and submitted April 11, 1984

Before: WISDOM,** SKOPIL, and NORRIS, Circuit Judges

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* Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

** The Honorable John Minor Wisdom, Senior Circuit Judge, Fifth Circuit Court of Appeals, sitting by designation.

Lewis brought this action against Joseph Magnin, Inc., New Magnin, Inc., and Eckdahl Warehouse Co. for breach of the collective bargaining agreement (unlawful discharge) and against the Brotherhood of Teamsters Auto Truck Drivers, Local 85 for breach of the duty of fair representation. The district court granted defendants' motions for directed verdicts. We affirm.

STATUTE OF LIMITATIONS

This section 301 action cannot be barred by retroactive application of the six-month limitations period adopted in DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983). Barina v. Gulf Trading and Transportation Company, 726 F.2d 560, 564 (9th Cir. 1984).

DUTY OF FAIR REPRESENTATION

A union breaches its duty of fair representation when its conduct is

arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). Unintentional acts or omissions "may be arbitrary if they reflect reckless disregard for the rights of the individual employee, ... severely prejudice the injured employee ... and the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case." Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978) (citations omitted). Simple negligence or poor judgment, however, is not generally a breach of the union's duty. See Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982). But see Dutrisac v. Caterpillar Tractor Co., ___ F.2d ___, No. 81-4251, slip op. at 3474, 113 LRRM 3532 (9th Cir. 1983), petition for rehearing pending (unexplained failure

to perform ministerial act in processing grievance resulting in severe prejudice to employee may negligently breach the union's duty of fair representation).

The union agent who investigated Lewis' grievance may have made errors in judgment by not filing a grievance against Magnin and by failing to obtain a copy of the agreement between Eckdahl and Magnin. Another agent gave a sketchy, casual presentation to the Joint Western Area Committee, the final grievance panel. These errors, however, do not reach the "egregious" level, reflecting "reckless disregard" for Lewis' rights. Robesky, 573 F.2d at 1089-90.

REPUDIATION

Lewis argues that Magnin cannot rely on the finality of the grievance decision because Magnin's conduct amounted to a repudiation of that process. In Kaylor v. Crown Zellerbach, Inc. 643 F.2d 1362, 1366 (9th Cir. 1981), we held that an

employee need not exhaust the grievance procedure when the employers's [sic] conduct amounted to a repudiation of the contractual remedies. Kaylor has no application here, however, because Magnin did not repudiate the grievance process. It was undisputed that Lewis' grievance named only Eckdahl and that Magnin was never asked to participate. Magnin's absence under these circumstances does not amount to a repudiation of the contractual remedies.

BREACH OF COLLECTIVE BARGAINING AGREEMENT

Because we find that the union did not breach its duty of fair representation and that Magnin did not repudiate the grievance process, we need not reach the issue of whether Magnin or Eckdahl breached the collective bargaining agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Fristoe v.

Reynolds Metal Co., 615 F.2d 1209, 1214 (9th Cir. 1980).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, vs. JOSEPH MAGNIN CO., INC., et al., Defendants.	F I L E D JUL 1 4:34 PM '83 Case No. C-81-1481 LHB ORDER RE: JOSEPH MAGNIN CO., INC.'S AND NEW MAGNIN, INC.'S MOTION FOR A DIRECTED VERDICT

On July 28, 1983, following six days of trial in the above-captioned matter and after conclusion of the Plaintiff's case, all Defendants moved for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure. One basis for the motion by each Defendant was the insufficiency of Plaintiff's evidence to establish necessary legal elements of his claim.

This Order, entered upon the motion of Defendants Joseph Magnin Co.,

Inc. and New Magnin, Inc. (collectively referred to as "Joseph Magnin"), is based upon the following findings:

1. Plaintiff has presented insufficient evidence to show that Defendant Teamsters Local 85 violated its duty of fair representation towards Plaintiff, a necessary precondition to a statement of a claim against any Company Defendant for breach of a collective bargaining agreement.

2. Plaintiff has presented insufficient evidence to demonstrate that Joseph Magnin and Eckdahl Warehouse Company were either alter-egos, single employers or joint employers such that Joseph Magnin was bound to a collective bargaining agreement through any such relationship.

3. Plaintiff has presented insufficient evidence to demonstrate that the jurisdictional requirements of Section 301 have been met insofar as

Joseph Magnin is concerned as there has been no showing that Joseph Magnin is party to a collective bargaining agreement concluded between it and a labor organization.

4. Plaintiff has presented insufficient evidence to show that Joseph Magnin was party to or bound by a collective bargaining agreement with Teamsters Local 85.

5. Plaintiff has not presented sufficient evidence to demonstrate that Joseph Magnin was prevented by either its Driver Service Agreement or any provision of a collective bargaining agreement from terminating the line-haul portion of the contractual relationship between Joseph Magnin and Eckdahl.

Having reached the findings set forth above based upon a review of the trial record and consideration of both

Defendants' motions for a directed verdict and Plaintiff's opposition to those motions, and good cause appearing therefrom, the Court hereby

ORDERS that Defendants Joseph Magnin Co., Inc. and New Magnin, Inc.'s motion for a directed verdict be and hereby is granted in accordance with the provisions of Rule 50(a) of the Federal Rules of Civil Procedure and further

ORDERS that Plaintiff's Complaint be and hereby is dismissed on the merits as against Defendants Joseph Magnin Co., Inc. and New Magnin, Inc. and further

ORDERS that Plaintiff pay Defendants Joseph Magnin Co., Inc.'s and New Magnin, Inc.'s costs of suit.

DATED: July 1, 1983.

/s/ Lloyd H. Burke
JUDGE, UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, v. JOSEPH MAGNIN CO., INC., a Corporation, et al., Defendants.	Case No. C-81-1481 LHB ORDER GRANTING DIRECTED VERDICT Hearing Date: Hearing Time:

This Court has before it Defendant Eckdahl Warehouse Company's ("Eckdahl") Motion for a Directed Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. The motion was heard by this

Court on June 28, 1983 after the conclusion of Plaintiff's opening case.

Eckdahl claims that it is entitled to a judgment in its favor, as a matter of law, based on the facts that Plaintiff's evidence does not establish that Eckdahl Warehouse Company breached any provision of the Collective Bargaining Agreement; Plaintiff's evidence does not establish that Plaintiff was laid off by Eckdahl for any reason other than the termination of Eckdahl's business relationship with Joseph Magnin, the concomitant loss of Plaintiff's original work assignment, and the lack of alternative work for Plaintiff; Plaintiff's evidence does not establish that Joseph Magnin agreed to be bound by the Eckdahl-Union Collective Bargaining Agreement; Plaintiff's evidence does not establish that the Union breached its duty of fair representation; and Plaintiff's evidence

has demonstrated that the February, 1980 Grievance Committee's decision is final, binding, and preclusive of this action.

Plaintiff alleges that the evidence shows that Eckdahl breached its Collective Bargaining Agreement with Defendant Local Union 85; that Eckdahl and Defendant Joseph Magnin are joint employers and that Joseph Magnin was bound by the Collective Bargaining Agreement between Eckdahl and Local Union 85 and that Local Union 85 violated its duty of fair representation in processing Plaintiff's grievance relating to Plaintiff's employment termination.

This Court has considered arguments both for and against this motion. Based on Plaintiff's evidence, together with all reasonable inferences drawn from the evidence viewed most favorably to Plaintiff, this Court concludes that Eckdahl is entitled to prevail on its motion, as a

matter of law. Based on the evidence presented by Plaintiff, the Court finds that:

1. Plaintiff's evidence does not establish that Local Union 85 violated its duty of fair representation towards Plaintiff, a necessary pre-condition to a claim against Eckdahl for breach of a Collective Bargaining Agreement;
2. Plaintiff's evidence does not establish that Eckdahl breached any provision of the Collective Bargaining Agreement;
3. Plaintiff's evidence does not establish that Plaintiff was laid off by Eckdahl for any reason other than the termination of Eckdahl's business relationship with Joseph Magnin, the concomitant loss of

Plaintiff's original work assignment, and the lack of alternative work for Plaintiff;

4. Plaintiff's evidence does not establish that Joseph Magnin agreed to be bound by the Eckdahl-Local Union 85 Collective Bargaining Agreement; and

5. Plaintiff's evidence has demonstrated that the February, 1980 Grievance Committee decision is final, binding, and preclusive of this action.

NOW, THEREFORE, IT IS ORDERED THAT the motion of Defendant Eckdahl for a directed verdict be and hereby is granted with judgment to be entered dismissing Plaintiff's Complaint on the merits against Eckdahl and awarding

Eckdahl its costs of suit.

Dated: July 1, 1983

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Court Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, v. JOSEPH MAGNIN CO., INC., et al., Defendants.	C-81-1481 LHB ORDER GRANTING DIRECTED VERDICT

Defendants Teamsters Local 85 has moved for a directed verdict in its favor at the conclusion of Plaintiff's opening case, as provided for in Rule 50(a) of the Federal Rules of Civil Procedure. The Court has heard argument by the respective parties on said motion outside the presence of the jury, and has reached the following conclusions:

ORDER GRANTING DIRECTED VERDICT

1. That the evidence submitted during the presentation of Plaintiff's opening case is insufficient under applicable legal standards to establish that Defendant Teamsters Local 85 violated its duty to provide Plaintiff with fair representation in the handling of Plaintiff's grievance which is the subject matter of this case, and that said Defendant is entitled as a matter of law to a verdict on this issue; and

2. That in any event Plaintiff's grievance arising out of his layoff lacked merit in that, contrary to Plaintiff's contention, the modifications made in the arrangements for the performance of the driving work to which Plaintiff was assigned prior to his layoff are not subject under the collective bargaining agreement to approval by the Change of Operations Committee. The modifications in work arrangements made in this case

involved a contracting of work to an outside party, whereas the Change of Operations provisions of the agreement apply only to modifications in work arrangements of the same employer whose employees perform the work both prior and subsequent to the modifications. Thus, Plaintiff has failed as a matter of law to establish a violation of the collective bargaining agreement in connection with his layoff. Under settled law, a judgment cannot be entered against Defendant Teamsters Local 85 based on an alleged violation of its duty of fair representation in the absence of a determination that a violation of the collective bargaining agreement has occurred.

For the foregoing reasons:

IT IS ORDERED that the Motion of Defendant Teamsters Local 85 for a directed verdict be and hereby is granted,

and that a verdict be entered by the Clerk of this Court for said Defendant.

Dated: June 30, 1983

/s/ Lloyd H. Burke
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1984, three copies of the Petition For A Writ Of Certiorari were mailed, postage prepaid, to counsel for each Respondent, addressed as follows:

Maureen E. McClain, Littler, Mendelson, Fastiff & Tichy, A Professional Corporation, 650 California Street, 20th Floor, San Francisco, CA 94108 [Joseph Magnin and New Magnin]; Michael J. Stecher, Silver, Rosen, Fischer & Stecher, A Professional Corporation, 100 Bush Street, Suite 410, San Francisco, CA 94104-3982 [Eckdahl Warehouse Company]; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982 [Local 85].

I further certify that all parties required to be served have been served.

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